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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 799

CENTRAL LOUISIANA ELECTRIC COMPANY, INC., ET AL.,

Petitioner,

versus

MRS. SARAH LOU P. MOSES, ETC., ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Counter Statement of Question Presented

Should the decision of the United States Court of Appeals for the Fifth Circuit, reversing a jury verdict based on erroneous, prejudicial instructions, and remanding the case for new trial, be reviewed by this Court?

Counter Statement of the Case

Mrs. Sarah Moses, individually, and as tutrix of her minor daughter, Karen Kay, and Mrs. Genevieve Newton, individ-

ually and as tutrix of her minor children, John Edward Newton and Judith Ann Newton, instituted suits for the death of their husbands, Mr. Robert Larry Moses and Mr. Robert D. Newton, resulting when a plane piloted by Mr. Newton, in which Mr. Moses was a passenger, collided with electric transmission lines suspended between two towers owned by Central Louisiana Electric Company and crashed into the Intracoastal Waterway near the town of Ramos, Louisiana, on November 8, 1957, at approximately 5:40 P.M.

Named defendants were Central Louisiana Electric Company and its insurer, Michigan Mutual Liability Company, whose negligence was alleged to have been the failure to light the transmission wires and towers in accordance with the Civil Aeronautics Administration's standards and thus failing to warn aircraft of this obstruction and hazard to air navigation which was directly in the take-off and landing paths of seaplanes using two seaplane bases located nine-tenths of a mile and six-tenths of a mile, respectively, from the transmission lines.

By means of an amended complaint, R. S. Woodruff, his insurer, State Automobile and Casualty Underwriters; R. D. Cooper, his insurer, Liberty Mutual Insurance Company, and the United States of America were added as parties defendant. Charges of negligence directed against Woodruff consisted of his failure to advise the Civil Aeronautics Administration of the nearest landing area, which he knew to be Slaton Seaplane Base, as required in Form ACA-117, filed by Woodruff with the Civil Aeronautics Administration, pursuant to instructions given him by Central Louisiana Electric Company, who had engaged him to design the transmission lines and towers; in failing to provide markings, signs and lighting fa-

cilities on the towers and lines and negligent design and supervision of the construction of such towers and lines.

Defendant R. D. Cooper, the contractor who erected the transmission towers and wires, was let out prior to submission of the case to the jury. A motion to dismiss filed on behalf of the United States of America alleging that the supplemental complaint naming it as defendant showed on its face that the action was brought after the expiration of the two-year limitation period prescribed by Title 28, United States Code, Section 2401(b), was granted.

Following a trial to a jury, the verdict returned by the jury stated in response to the special issues that it found Central Louisiana Electric Company guilty of negligence; that such negligence was not the proximate cause of the accident; that Woodruff was not negligent; that Mr. Newton was negligent and his negligence was the proximate cause of the accident.

Plaintiffs' motion requesting that the verdict in favor of defendants be set aside and a new trial be granted limited to the question of *quantum* only, or in the alternative that a new trial be granted on all issues, was denied by the trial Court.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the judgment in favor of defendant, R. S. Woodruff, and reversed the judgment in favor of defendants Central Louisiana Electric Company, Inc., and its insurer, Michigan Mutual Liability Company, and remanded the case for new trial.

The Facts

On November 8, 1957, Louis D. Newton flew a twin-engine Grummond G-44 Widgeon amphibious plane, based at Slaton Seaplane Base, and owned by his employer, Kerr-McGee Oil Corporation, to an oil rig in the West Delta area, near the mouth of the Mississippi River, carrying as his passenger Robert L. Moses, also employed by Kerr-McGee. (Tr. pp. 181-2, 648.)*

Desmond S. Hare, chief pilot for Slaton Seaplane Service, (Tr. p. 176), had also flown out of Slaton Seaplane Base that afternoon, and during his return flight to the base received a message from Newton, who stated that he was passing Houma and was about ten minutes behind Hare, traveling in the same easterly direction (Tr. p. 183). Continuing on, Hare noted that the wind was out of the west-northwest, and since it was dusk, approximately five minutes past five o'clock, it was best for him to make his landing by dropping down to tree level height and go in under the Central Louisiana Electric Company's wires, using a straight-in approach. (Tr. p. 184.) A considerable amount of boat traffic on the Intracoastal Waterway on which Slaton Seaplane Base was located made it necessary for Hare to land a little bit short. (Tr. p. 184.) At approximately 5:30 P.M., Newton, coming from the same direction, crashed into the wires suspended across the Intracoastal Waterway.

1. Eyewitnesses to the Accident.

George Reynolds, district supervisor of May Bros., who flew out of Slaton Seaplane Base for the past four years, was

* Tr. is used throughout the brief to denote references to the trial transcript.

driving west on Highway 90, which parallels the Intracoastal Waterway in the vicinity of the site of the crash. (Tr. pp. 242-3, 248-9.) When he reached a point three-quarters of a mile west of the Central Louisiana Electric Company's towers, Reynolds saw a plane with its clearance light and rotating beacon on out of the left side of his windshield. (Tr. pp. 245, 249, 258.) At that moment the plane was between Reynolds and the towers, over the water, parallel to the waterway, at an altitude estimated at 600 feet by Reynolds. (Tr. pp. 245, 250-1.) Shifting his gaze from the plane, Reynolds next remembered seeing "flash sparks" and then the plane in the water (Tr. p. 246); one of the wires suspended from the towers was down and in the water (Tr. pp. 254-5.)

Mr. and Mrs. Bernie J. Hebert, driving east on Highway 90, were just passing Slaton Seaplane Base when they saw a light in the sky through the right side of the windshield. (Tr. p. 267.) Mr. Hebert realized the lights were on a plane which appeared to be about as high as the towers, coming in a westerly direction to make a landing on the water. (Tr. pp. 261-2.) Mr. Hebert was unable to discern the wires. (Tr. pp. 262-3.) Keeping the plane in his view, Mr. Hebert saw it stop in mid-air, as though it had hit the wires, and a flash occurred. (Tr. p. 265.) Trees then blocked Hebert's view until he reached the Bayou Boeuf Bridge, at which time he saw the plane in the water, between two boats. (Tr. pp. 263-4.) A wire from the tower was lying across the electric wires running beside the highway. (Tr. p. 265.) Mr. and Mrs. Hebert turned back and used the phone at a nearby house to summon the Morgan City police. (Tr. p. 266.) Although the Heberts stayed at the scene some time thereafter, they were unable to see rescue operations because darkness had set in. (Tr. p. 266.)

Lloyd V. Funchess, Jr., a pilot in the employ of Guarisco Construction Company, had returned from a flight that afternoon, and was talking to a mechanic at the Guarisco Seaplane Base, located just east of the Slaton Seaplane Base on the Intracoastal Waterway, shortly before the accident. (Tr. pp. 280-1.) Funchess saw a plane approaching from the east, just above the towers, making a left-hand turn to line up with the canal. (Tr. pp. 285-6, 291.) The position of the plane was approximated by Funchess as being at least two or three thousand yards east of the towers at that time. (Tr. pp. 291-2.) The plane then went out of Funchess' line of vision, and he next heard a crash or explosion. (Tr. pp. 286-7.) Looking down the canal, he saw a splash of water as the aircraft hit the water. (Tr. p. 286.) The mechanic and Funchess immediately put a small boat overboard, but when they got to the scene only the tail portion of the plane was still above the surface of the water. They secured the tail to the offshore boat located near the plane, to keep the plane from sinking further. (Tr. pp. 287-8.) The offshore boat dragged the plane to shallow water. (Tr. p. 288.)

Levi Wilson first saw the plane east of him, headed west with its wing light on, as he was seated on the fender of his car in the driveway of the Maguire house 317 feet off Highway 90 at Bayou Ramos. (Tr. pp. 315-6.). As the airplane was passing Wilson, it was over the Intracoastal Waterway. (Tr. p. 318). Moments after Wilson took his eyes off the plane, he heard a crash, saw it stop in mid-air (Tr. p. 323), and saw it falling into the water. The witness could not see the wires or towers from his vantage point (Tr. pp. 319-20); he then drove to the scene and saw someone tying a rope to the plane (Tr. p. 320).

Captain A. A. Smith of Coyle Lines, Inc., on the day of the accident, was in the wheelhouse of a tugboat proceeding east on the Intracoastal Waterway towing five barges having an overall length of 1100 feet. (Tr. pp. 437-8, 440.) The witness stated it was just about twilight and the running lights of the tugboat were on, consisting of a white range light on top of the mast which could be seen all around, horizontal and straight above; the other lights could be seen only from the front. (Tr. pp. 445-6.) As Captain Smith passed the Slaton Seaplane Base, he met an offshore boat going in the opposite direction with its running lights on. (Tr. pp. 439, 445.) A space of about 25 feet separated the tug and its barges from the west-bound offshore boat. (Tr. pp. 451-453.)

When Smith's tugboat was just beyond the wires, the witness first saw the aircraft, coming over the tree tops, approximately 25 or 50 feet above them, at a 45-degree angle, one-half to three-quarters of a mile east of the tugboat. (Tr. pp. 443, 451.) After catching sight of the plane, Captain Smith directed his attention to the waterway; he next saw the plane when one of the men in the wheelhouse shouted that a plane was falling and looked like it would hit the last barge. (Tr. p. 443.) At that moment, the stern of the last barge was beyond the towers. (Tr. pp. 443-4.) Captain Smith looked back and saw the plane falling into the water about in the middle of the Intracoastal Waterway. (Tr. p. 445.) He immediately slowed the tugboat, turned back to return to the plane in the event someone in the plane had jumped or was thrown clear into the water. (Tr. p. 446.) The witness observed a winch truck attaching a wire to the plane; thereafter, Captain Smith assisted in removing the plane from the channel. (Tr. p. 447).

2. Establishment and Operation of Slaton Seaplane Base.

Dan Slaton testified that his seaplane base was established in 1953; in addition to renting space and providing services for seaplanes belonging to other companies, Slaton chartered his own planes, operated by him or his employees, Roger Ward and Desmond Hare. (Tr. pp. 482, 485.) Approximately fifteen takeoffs and landings were made a day between 1953 and November 1957, not including his own aircraft, and the base has not been closed a single day since its opening. (Tr. p. 483). On October 16, 1956, Slaton was issued an air carrier certificate authorizing him to operate as an air taxi operator and certifying that Slaton Seaplane Base has met the regulations and standards applicable thereto. (Tr. pp. 485-6.)

When the construction of the towers and high lines began, Slaton wrote to Central Louisiana Electric Company (hereinafter referred to as CLECO) on March 12, 1956, requesting the installation of extra markings on the wires in order to make them easier to see since they were a hazard to air traffic using his seaplane base. (Tr. p. 488; copy of letter marked Plaintiffs' 38.) Because the towers were also directly in the path of planes taking off and landing, constituting a hazard to air navigation, Slaton assumed CLECO would equip them with lights, especially in view of the fact that all other towers in the vicinity were lighted. (Tr. pp. 488, 492-3.) The witness knew of no towers within 4,000 feet of a landing base, as CLECO's towers are, which are not lighted. (Tr. p. 506.)

Desmond Hare, employed as an office manager by Slaton in 1954, and later flew Slaton's plane (Tr. p. 176), stated that during the construction of these towers he asked a CLECO

employee pointed out to him as being in charge of the job if lights would be put up every 150 feet on the towers. (Tr. pp. 177-8.) This employee informed Hare that he was aware there would have to be lights and everything was being taken care of. (Tr. p. 178.)

3. Design and Construction of the Towers by CLECO.

On May 12, 1953, R. S. Woodruff of Fort Worth was contacted by Mr. Bonnette, an official of CLECO, with respect to preparing plans and specifications for certain towers over the Atchafalaya River, Bayou Boeuf and Bayou Shaffer. (Tr. pp. 353, 355.) Woodruff explained that his brother had been doing work for CLECO in 1953, and after he became associated with his brother, Woodruff had been performing work for them "on a more or less continuous basis . . ." (Tr. p. 349.)

Woodruff sent crews to the area of Bayou Boeuf, beginning in March of 1954, to make surveys under the direction of CLECO, who designated the locations for the towers involved in this accident, known as Bayou Boeuf No. 1 near Ramos. (Tr. pp. 555-7.) The survey, encompassing 50 feet on each sid of the center line, was under the direction of Woodruff's employee, C. T. McNeil, who sent field notes to Woodruff's office during the progress of the work. (Tr. pp. 357-8.) The final routing was made in May of 1955. (Tr. p. 355.) The towers were 214 feet from the top of the steel to the mean highwater mark of the Intracoastal Waterway (Tr. p. 367); Woodruff's plans and specifications did not provide for marking and lighting of these towers and lines in any way. (Tr. p. 375.)

Bonnette of CLECO requested Woodruff to contact the Civil Aeronautics Administration office in Fort Worth to ascertain what forms should be filed with that agency in connection with the construction of the towers and wires. (Tr. p. 381.) Bill Howe, one of Woodruff's employees, secured the necessary forms, filled them out; Woodruff signed them and sent a letter of transmittal to the Civil Aeronautics Administration. (Tr. p. 382.) The form, dated October 24, 1955, entitled "Notice of Construction or Alteration" ACA-117, was introduced in evidence as Woodruff 2A. (Tr. pp. 385, 387, 389.)

Paragraph 5 of this form asked for the name of the nearest landing area to the proposed structures, which was answered by Woodruff and his employees by the words "None known." Paragraph 6 requested the distance and direction of the nearest landing area from the structures and was answered by a "little dash" on the typewriter and nothing more. (Tr. p. 386.)

Form ACA-117 was received by Earl Stone of the Civil Aeronautics Administration (hereinafter referred to as CAA, or by Federal Aeronautics Administration, FAA, successor to the CAA) on October 31, 1955. (Tr. p. 392.) Woodruff testified he received no answer to his letter of transmittal and assumed the forms were sent back to CLECO. (Tr. p. 392.) Thereafter, no CLECO official ever told Woodruff to place any special marking, painting or lighting on the towers. (Tr. p. 399.)

Woodruff testified he did not know personally of the existence of Slaton Seaplane Base, nor had been informed of it through his employees or those of CLECO, until the tak-

ing of his deposition in 1960. (Tr. pp. 398-9.) Form ACA-117, in requesting the name of the nearest landing area, defined landing area as a place where land or seaplanes are landing and which is noted in the Airman's Guide. (Tr. p. 397.) Woodruff testified he believed his responsibility as an engineer placed on him the duty to follow the instructions on Form ACA-117 and to have his employees check air charts as well as the Airman's Guide for any landing area listed therein. (Tr. p. 397.) Because Slaton Seaplane Base did not appear in such charts and guide, Woodruff, through his employees, did not advise the CAA that the towers and wire would be 4000 feet from this seaplane base. (Tr. p. 398.)

In his deposition of June, 1960, Woodruff stated he did some flying (Tr. p. 405), and in answer to the question of what steps he would have taken had he actually known these 214-foot towers were 4,000 feet from Slaton Seaplane Base, he gave his answer as follows:

> "I would have consulted with my client, in all probability. After discussing with him, I would have said, 'It kind of looks like to me like you ought to put some kind of flagging or streamers or something on these top wires. It is a daytime operation, and that ought to suffice unless the CAA has some different recommendation. Suppose we go and ask them'; and I would have gone and asked them and come back to my client and said what it was, and if he said 'I don't want it,' I would have said 'Well, I have advised you.'" (Tr. p. 403).

William M. Howe, a junior office engineer with Woodruff, testified he was asked by Woodruff to contact his former employer, the CAA-FAA, to find out about the necessary documents for completion or construction notice for work going

on at three crossings, Ramos, Berwick and Pharr, Louisiana. (Tr. pp. 627-8.) Howe spoke with Earl Stone of the CAA-FAA, and subsequently received several copies of the "Notice of Construction or Alteration" Form ACA-117. (Tr. pp. 628-9.) After reading the instructions on the back of this form, Howe consulted current aeronautical charts, the Coast Guard Chart (Tr. p. 631), and found the closest landing area listed on these charts to be Williams Memorial Airport at Patterson, Louisiana, approximately seven or eight miles away. (Tr. pp. 632-4.) It was Howe's belief that he also consulted the Airman's Guide; although he did not recall doing so and did not find Slaton Seaplane Base. (Tr. pp. 632-4.) After these forms were filed with the CAA-FAA, Woodruff asked Howe to contact Mr. Stone to determine the current status of the documents. (Tr. pp. 635-7.) Stone advised that the forms had been forwarded to CLECO. (Tr. p. 637.)

On cross-examination, Howe testified his work with Woodruff in connection with these towers consisted of the reduction of field notes on to various maps and cross-sections of the crossings. He did not know if these field notes contained any information relating to landing areas or seaplane bases. In the preparation of the CAA-FAA forms, Howe assumed Woodruff had looked at the current aeronautical charts with him. (Tr. p. 640.)

It should be noted that the CAA-FAA requires any person constructing a structure over 150 feet high and within 15,000 feet of a landing area or 20 miles of a civil airway must file a "Notice of Construction or Alteration" Form ACA-117. (Tr. p. 542.) Moreover, George Lambrose, plaintiffs' expert, testified that the official aeronautical chart of Louisiana, dated April 1, 1953, as well as other current aero-

nautical charts, showed that Brown and Root's Airfield was located within 15,000 feet of the CLECO towers involved in this accident and also within 20 miles of a civil airway. (Tr. pp. 595-7, 600.)

When Howe was questioned regarding his failure to list Brown and Root Airfield on the Form ACA-117 as the nearest landing area, which Howe admitted was included on the aeronautical charts and presumably in the Airman's Guide, Howe was unable to explain. (Tr. pp. 641-3.) His answer was as follows:

> "Q. You weren't interested then in giving the name of the nearest landing area?
>
> "A. For the purpose of the form, no, sir."

Howe could not say whether he looked for the Brown and Root Airfield in the Airman's Guide "because of the time lapse." (Tr. p. 643.)

N. A. Bonnette, an electrical engineer with CLECO, testified he was in charge of construction of the towers at Bayou Boeuf (Tr. p. 458-9 as project engineer (Tr. p. 461), approving plans and specifications for the towers submitted by Mr. Woodruff (Tr. p. 461.) While Mr. Berry was the direct supervisor of the job, Mr. Bonnette visited the site quite often. (Tr. p. 460.) Before, during and after construction of the towers, Mr. Bonnette knew "Slaton's place" was there (Tr. p. 464), and he "did know possibly that structures of that type might or should have been lighted" (Tr p. 463). On his deposition taken September 27, 1961, he was asked if he was aware such towers could be hazardous for aviation, to which he answered yes. (Tr. p. 464.) Mr. Bonnette testified he would repeat that answer on the stand. (Tr. p. 464.) Also,

on his deposition the following question was posed to Mr. Bonnette:

> "Q. I will ask it again, 'Was it your understanding that where such a tower, such as 10 and 11, these two towers in question, were within a certain number of feet . . . let's say 4,000 feet off of a landing base, landing field, that there were certain requirements as to the markings of such towers? Do you know that?' And your answer was, 'Yes, if that tower had been at a - -' And then there were two dashes, 'within the proximity of a landing field, I would say that we would have possibly lighted them, I don't know.' Did you answer that?
>
> "A. As I recall I answered it just that way, yes." (Tr. p. 465.)

Mr. Bonnette did not recall having any conversations with Mr. Woodruff or his employees with regard to the fact that Slaton Seaplane Base was 4,000 feet from the towers and did not give such information to the CAA (Tr. p. 466); although he did know that the CAA was to be advised that the construction was to take place (Tr. p. 466). It was Mr. Bonnette's testimony that he did not see a copy of the form filed by Mr. Woodruff with the CAA until after the accident (Tr. pp. 467-8), and presumed that the form was received from the CAA by Mr. B. B. McGrath, in charge of the right-of-way department in Alexandria (Tr. pp. 468-9). Mr. Bonnette did not recall whether he was notified by Mr. Woodruff or Mr. Randall, his superior, that there were no requirements made by the CAA; however, on his deposition he stated that:

"Q. I will read you the question, and then - - this is on Page 78, 'Well, on this particular job for the Bayou Boeuf crossing, were you informed of any approval, disapproval, or action on the part of the CAA?' You said, 'Yes, I was notified by Mr. Woodruff in a telephone conversation that there were no requirements as far as they were concerned. Question: Mr. Woodruff told you that personally? Verbally? Answer: I don't recall whether it was F. E. or R. S. Question: One of them told you? Answer: Yes. Question: And you saw and had copies of the application itself?' And you answered, 'Yes, sir.'" (Tr. pp. 470-1.)

By way of explanation Bonnette again asserted he did not have a copy of the form as of the date it was forwarded to the CAA officials, but only after the accident.

"This is Page 83: 'I see. You don't know who in CLECO would know? Offhand, no, sir, I would not. Have you ever notified anybody in the Alexandria office? I have no reason to, so I did not. A copy was good enough - - You got a copy at that time? Well, that is the original that Mr. Stone sent. Yes. Now, the copies I refer to are photostatic copies. Is that just as legal as - - What I'm trying to get at is when did you get the copy? Answer: 'The copy of the form was sent to me, or I got it later, considerably later, from Mr. Woodruff.'" (Tr. p. 473.)

Mr. Berry, field engineer with CLECO, testified he was in charge of the construction of towers at Bayou Boeuf. (Tr. p. 477.) The fact that Sfaton Seaplane Base was located 4,000 feet from the towers and that planes were landing and taking off there before, during, and after the construction was admittedly known to Mr. Berry. (Tr. p. 479.)

Mr. R. D. Cooper, an electrical contractor who entered into a contract with CLECO to erect towers and transmission lines (Tr. p. 422), furnished only labor, supervision and tools. (Tr. p. 423.) Mr. Berry, supervisor for CLECO, was on the job every day. (Tr. p. 423.) No request to paint or light these towers and lines was ever made by anyone for CLECO. (Tr. p. 424.) Cooper was asked by Bonnette to install six orange balls on the wires as they were being strung. (Tr. p. 425.)

4. Requirements of the CAA-FAA Concerning Marking and Lighting of CLECO's Towers and Wires.

Earl Stone, testifying as the Court's witness, stated that he was employed by the FAA, and in 1955 was an air space utilization officer concerned with anything which might be regarded as an obstruction to air navigation. (Tr. pp. 523-5.) The witness stated that towers 214 feet high, located 4,000 feet from a seaplane base, such as those involved in the case at bar, would be designated by the FAA as obstructions to air navigation. (Tr. pp. 535-7.) Such obstructions should be painted international orange and white in alternating stripes. (Tr. p. 537.) Stone testified that the CAA-FAA has published a manual entitled "Obstruction Marking and Lighting Standards for Marking and Lighting Obstructions for Air Navigation," of which the latest publication is dated November 1, 1956. (Tr. pp. 527-8.) On page 10 of this manual appears specification A(2), which was read to the jury, dealing with the lighting of such an obstruction to air navigation as was presented by CLECO's towers:

> "Q. When the particular obstruction is more than 150 feet but not more than 300 feet in overall height above ground or water, if so situated there should be installed at the top of the obstruction a flashing

300 millimeter electric code beacon, equipped with two lamps, and aviation red-colored filters. The two lamps of the beacon should be burned simultaneously, and each lamp should be at least 500 watts.

"Where a rod or other obstruction - - or other construction of not more than 20 feet in height and incapable of supporting this beacon is mounted on top of the obstruction, and it is determined that this additional construction does not permit unobstructed visibility of the code beacon from aircraft at any normal angle of approach, here should be installed two such beacons, positioned so as to insure unobstructed visibility of at least one of the beacons at any normal angle of approach. At the approximate mid point of the overall height of the obstruction there should be installed at least two lights, each light consisting of a lamp of at least 100 watts enclosed in aviation red obstruction light globes. Each light should be placed on diagonally or diametrically opposite positions of the obstruction and mounted so as to insure unobstructed visibility of at least one light from aircraft at any normal angle of approach. In case of triangular or rectangular-shape tower, the light of the mid-level should be mounted so as to insure unobstructed visibility of at least one light from aircraft at any normal angle of approach, or a light should be installed on each corner of the tower at this level." (Tr. pp. 531-2.)

Therefore, a tower between 150 and 300 feet high, within 3,000 feet of a landing area, or within 20 miles of a civil airway, would have to be lighted as prescribed in the foregoing specification. (Tr. p. 532.)

The CAA-FAA manual provided for marking of overhead wires as follows:

"Overhead wires: Marking devices placed on overhead wires should be spherical in shape with a diameter of not less than 20 inches, or may be of other shapes provided the projections of such type of marker on any vertical surface normally to each direction from which an aircraft is likely to approach the obstruction will not be less than that presented by the spherical-type marker described above. At least one such marker should be displayed for each 150 feet or fraction thereof of the overall length of the overhead line. These markers should be placed at equal intervals not more than 150 feet apart with the top of each marker not below the level of the highest wire at the point marked, and should be covered as specified under the marking of obstructions by colors. The distance between markers and overhead wires located more than 15,000 feet from the reference point of any landing area may be increased to a distance of not more than 600 feet - -"

"Q. And if you were to assume that the distance between two towers is 1250 feet, then how many balls or markings should be placed?

"A. I believe the Manual stated, they recommended every 150 feet or fraction thereof, so it would be a matter of dividing that distance by 150 feet.

"Q. And if there were only six of these markers placed, six of these balls placed there, would it be two balls short, wouldn't it?

"A. I believe that is correct, sir." (Tr. pp. 540-541.)

Any person constructing a structure over 150 feet high within 15,000 feet of a landing area or within 20 miles of a civil airway was required by the manual, page 24, to file a notice of construction or alteration, Form ACA-117. (Tr. p.

542.) Such notice of construction, or alteration, signed by R. S. Woodruff, was received by Earl Stone. (Tr. pp. 543-4.) Following receipt of such a notice, Stone stated he would first check the location of the construction and also to see if there was any landing area listed on the Form ACA-117 which was submitted. (Tr. p. 546.) Stone would then plot the location of the structure on an aeronautical chart, and examine the chart to see if any landing areas or civil airways existed in the vicinity. (Tr. pp. 546-7.)

In order to determine whether or not civil airways or landing areas were present, Mr. Stone used sectional aeronautical charts which show airports, aids to navigation, and civil airways (Tr. pp. 547-548), as well as Form 29A, showing all detailed information on each airport such as length of runways and elevations (Tr. p. 548). He also referred to the Airman's Guide to ascertain if there were any airports listed in the Guide that were not yet published on aeronautical charts. (Tr. p. 548). Stone stated that he relied in part upon the information furnished by CLECO on Form 117 and did not go to the site of the construction. (Tr. p. 549.)

Mr. Stone explained that a landing area is defined as follows:

> "Landing areas shall mean any locality either on land or water including airports and intermediate landing fields which is listed as an airport in the current issue of the Airmen's Guide and is used for the landing and take-off of an aircraft whether or not facilities are provided for sheltering, servicing or repairing aircraft or for receiving or discharging passengers or cargo." (Tr. pp. 551-2.)

The boundary of a landing area as defined by the manual was given as follows:

> "A. The boundary of a landing area shall mean, '(1) Any one of the limits of that portion of the landing area maintained for the use of land aircraft in taking off for landing; or (2) Any one of the limits of that portion of the landing area used for water aircraft in taking off or landing, which limits are designed as being 5,000 feet in all directions measured over on water from the principal ramp of the landing area or if marked in accordance with standard practice, the limits of the landing area so marked.'" (Tr. p. 542.)

The witness explained that the owner of the airport submits a form to the FAA requesting his airport be included in current aeronautical charts and specifications (Tr. p. 552.) Should he fail to do so, his airport does not appear on the aeronautical charts of Airmen's Guide. (Tr. p. 553.)

The District Judge asked Stone what procedure he would follow in the event an individual or corporation filed Form ACA-117, listing as the nearest landing area a base not listed in the aeronautical chart and Airman's Guide, and the witness responded as follows:

> "I would normally write the operator of the airport as listed on this form and advise him there is a proposed construction and give him the specifics on the case and see if he had any recommendations concerning this proposed construction and of course my action would be based to some extent on what his reply contained.'" (Tr. pp. 557-8.)

If it were economically feasible, Stone added that he might send someone to the location. (Tr. pp. 558-9.)

The witness was asked what steps he would take if he received a Form ACA-117 which listed the nearest boundary

of a landing area as 4,000 feet from the proposed structure, and replied as follows:

> "A. Well, first of all, if it had the airport listed as you specified, then I would need additional information, so, therefore, as I stated previously, I would go back to the airport operator and ask him what direction are your approached (sic) at this base, **because it is possible that the construction could be in the approach area, which would require more rigid marking and lighting than if it were not in the approach areas."** (Emphasis supplied, Tr. pp. 559-60.)

Even if a Notice of Alteration and Construction, Form ACA-117, was not required to be filed, but was actually filed with the CAA-FAA, Stone testified that he would recommend the structure be marked and lighted as would be appropriate to the operation of the adjacent airport if he found the structure to be an obstruction. (Tr. p. 560.) Furthermore, he would issue a notice of this obstruction to the Airman's Guide so that it could be included therein. (Tr. p. 560.)

Mr. George Lambros, who has specialized in buying, operating and selling Widgeon aircraft, the same type that Mr. Newton flew, and has flown 7500 hours in Widgeons (Tr. p. 513), testified that the Corps of Engineers, U. S. Army Map of the Morgan City area, dated 1955, showed the Brown and Root Airfield to be within 15,000 feet of the CLECO towers. (Tr. pp. 595-7—marked plaintiff 39.) The official aeronautical chart of Louisiana dated April 1, 1953, marked plaintiff 41, also showed the existence of the Brown and Root Airport. (Tr. p. 598.) The N. O. Sectional Aeronautical Chart and the World Aeronautical Chart for Galveston Bay Area—marked plaintiffs 42 and 43, respectively (Tr. p. 600), dated Feb. 11,

1957, showed that Victor 20-South Civil Airways is approximately eight miles to the edge of the airway and the 13 miles to the center of the airway from the Slaton Seaplane Base.

Thus, despite the fact that Slaton Seaplane Base was not listed in the aeronautical charts or the Airman's Guide at the time Woodruff filed Form ACA-117 on behalf of CLECO, Brown and Root Airport and Victor 20-South Civil Airway were included on these documents, and Brown and Root Airport should have been listed as the nearest landing area. The proximity of the Brown and Root Airport as well as the Civil Airway required that lights be installed on CLECO's towers in accordance with specification A(2) quoted above and found on pages 531-2 of the transcript.

5. Evidence Relating to the Hazards to Air Navigation Inherent in the Location and Height of CLECO's Unmarked, Unlighted Towers and Wires.

The uncontradicted evidence educed from George Lambros and pilots whose planes were based at Slaton or Guarisco Seaplane Bases, showed that the towers and wires were in the gliding area of the Widgeon Newton was flying prior to the fatal accident. (Tr. pp. 190, 585-6.) The safest means of landing was to fly under these wires for several reasons. (Tr. pp. 188-9, 283, 341, 586.) Mr. Hare stated it was impossible for a Widgeon to go over the wires and then begin its descent without straining the craft's structure. (Tr. p. 236.) Hare also testified that a landing east of the wires was not feasible because taxiing the airplane the necessary distance to the base would cause the engines to overheat. (Tr. p. 226.) In addition, flying over the wires presented the possibility of the plane stalling and falling into the wires. (Tr. pp. 188, 587.)

Hare testified that on the day of the accident it would have been out of the question to come in from the west because of heavy boat traffic (Tr. p. 219), leaving a pilot such as Newton no choice but to come in from the east under the wires. Hare and Funchess both testified they knew of no regulation forbidding an aviator from flying under such a structure. (Tr. pp. 227, 289.)

The dull silver color of the towers made them extremely hard to see, as they blended in with the foliage. (Tr. p. 192.) The wires, unmarked except for six red balls, were very difficult to see (Tr. pp. 192, 284-5, 329), and in Roger Ward's words were a "known hazard" (Tr. p. 345). Photographs taken from the front of the plane on the final approach, every 100 feet, marked plaintiff 11-35, Tr. p. 199, were taken by Desmond Hare on the same type of day, and at the same time as Newton made his landing. (Tr. pp. 193, 196.) Plaintiff 30, an enlarged photograph showing the approach from the east, clearly indicates how difficult the towers and wires were to discern. (Tr. p. 199.)

ARGUMENT

I. THE JUDGMENT OF THE COURT OF APPEALS, SETTING ASIDE THE FINDING THAT LEWIS NEWTON WAS CONTRIBUTORILY NEGLIGENT AND THAT HIS NEGLIGENCE WAS THE PROXIMATE CAUSE OF THE ACCIDENT, WAS CORRECT AND SHOULD NOT BE DISTURBED.

A. The Jury's Finding Was Contrary to the Manifest Weight of Evidence.

Under the law of Louisiana ". . . in the absence of clear creditable evidence to the contrary, a presumption of due care on the part of the deceased rises to the dignity of evidence." *Finn v. Employers' Liability Assurance Corporation*, 141 So. 2d 852, 875 (La. App. 1962); *Begnaud v. Texas & New Orleans Railroad Co.*, 136 So.2d 123 (La. App. 1962), *cert. denied*, (1962); *Simon v. Texas & New Orleans Railroad Co.*, 124 So.2d 646 (La. App. 1960), *cert. denied* (1962).

An examination of the record discloses that petitioners were unable to present any evidence indicating contributory negligence of Louis Newton; moreover, testimony given by plaintiffs' witnesses showed that prior to the crash Newton was employing the safest methods of making a landing.

Pilots who had made such a landing stated that the safest procedure was to begin the approach 1,000 to 2,000 feet east of the wires (Ward—Tr. p. 342; Lambros—Tr. p. 586), and to fly under the wires (Hare—Tr. pp. 188-9; Funchess—Tr. p. 283; Ward—Tr. p. 341; Lambros—Tr. p. 586). Eyewitness Funchess testified that he saw Newton's plane approaching from the east, 2,000 or 3,000 yards east of the towers, at an altitude just above the towers. (Tr. pp. 291-2.) Captain Smith estimated the plane was one-half to three-quarters of a mile east of the towers, 25 to 50 feet above the treetops. (Tr. pp. 433-451.) As the Court of Appeals noted in its opinion, "That was a customary route of approach to the Slaton Base." *Moses v. Central Louisiana Electric Company*, 324 F.2d 69, 71 (5th Cir. 1963).

Newton's plane did not pull up into the wires, but rather, witnesses saw the aircraft stop in mid-air, and then fall into the water. (Hebert—Tr. p. 263; Wilson—Tr. p. 323.) Testimony that the wires were almost impossible to see (Hare—

Tr. p. 192; Ward--Tr. p. 345), coupled with the photographs giving graphic evidence of this fact (Tr. pp. 193-200, plaintiffs' 11-35), lend support to the probability that Newton was making a customary landing and crashed when he collided with the invisible wires.

It was encumbent upon petitioners to prove Newton was contributorily negligent, and this burden cannot be discharged by a showing of mere speculation or conjecture. *Chapman v. United States*, 194 F.2d 974 (5th Cir. 1952); *Finn v. Employers Liability Assurance Corporation, supra.* The happening of an accident does not give rise to a presumption of such negligence; the occurrence of an accident is insufficient to take the case to the jury. *Rennekamp v. Blair*, 373 Pa. 620, 101 A. 2d 669 (1954).

Because petitioners presented no evidence that negligent acts were committed by Newton which resulted in the crash, the jury's finding that his negligence proximately caused the accident was clearly erroneous, and was properly reversed by the Court of Appeals.

B. Instructions Relating to the Issue of Newton's Contributory Negligence Were Erroneous, Misleading, and Should Not Have Been Given.

Respondent submits that there was no evidentiary basis for the following instructions:

> "To constitute actionable negligence for which recovery can be had again t Central Louisiana Electric Company and their Insurer, Michigan Mutual Liability Company, you must first find negligence on the part of CLECO and, in addition, you must also find that such negligence proxi-

> mately caused the death of Louis Newton in a natural and unbroken sequence of events, without any independent intervening act by Louis Newton. Therefore, where there occurs between an original act of negligence and the final accident to a person, an entirely independent and unrelated act of negligence by another which intervenes and is of itself sufficient to stand alone as the cause of the accident, then the second and intervening negligent act is regarded in law as the proximate cause of the accident." (Tr. pp. 729-130.)

As pointed out above, no negligent intervening act is revealed by the evidence, and hence no such principle of law should have been mentioned to the jury. Under these circumstances, this Court has held such instructions constituted reversible error. *Keyser v. Hitz*, 133 U.S. 138 (1890); *Knickerbocker Life Insurance Company v. Foley*, 105 U.S. (15 Otto) 350 (1882); *Orient Mut. Ins. Co. v. Wright*, 68 U.S. (1 Wall.) 456 (1864).

In *Tharp v. Mundy*, 195 F.2d 987, 989 (5th Cir. 1952), the district judge granted a request for instructions dealing with contributory negligence on the part of the plaintiff-guest. The appellate court held the judgment must be reversed since contributory negligence was not raised by the evidence.

The Seventh Circuit Court of Appeals voiced a like conclusion in *McCarthy v. Pennsylvania Railroad Company*, 156 F.2d 87[illegible] (7th Cir. 1946), at page 882.

> "Secondly, the instruction is improper because it told the jury that the plaintiff could not recover if his decedent was guilty of acts of negligence that solely caused his death. As an abstract proposition of law that is correct, **but there was no evidence of any independent acts of neg-**

> **ligence by the decedent** that was the sole cause of the accident and his death. The Court had instructed on a proposition about which there was no evidence." (Emphasis supplied.)

The action of the trial court herein was in direct conflict with the authorities cited above, and was properly reversed by the Court of Appeals.

C. The Trial Court Erred in Refusing to Give Respondents' Charges on Sudden Emergency.

Respondents submit that the record discloses ample evidence justifying an instruction to the jury relative to sudden emergency. Uncontradicted testimony established that canal traffic was very heavy on the day of the accident (Tr. p. 219) and, shortly before the accident, Captain Smith's tugboat with five barges in tow was passing an offshore boat in the vicinity of the towers and wires. Such evidence could give rise to an inference that as Newton attempted to land he was faced with a sudden emergency not of his own making, that of the canal being occupied by these vessels, and he decided not to land. The unmarked wires, 36 feet wide from top to bottom wire (Tr. p. 426), were then invisible and the collision occurred as he tried to gain altitude, preparatory to circling the canal again. (See plaintiffs' requested charges 18, 19, Tr. pp. 124-5.)

The Court of Appeals conclusion on this issue was expressed as follows:

> "We suggest, also, that, on another trial, the district court take particular note of the evidence to see whether an appropriate charge on the question of sudden emergency should be given."

Moses v. Central Louisiana Electric Company, supra, at p. 73.

The doctrine of sudden emergency was defined by the Louisiana Supreme Court in *Snodgrass v. Centanni*, 229 La. 915, 87 So. (2d) 127 (1956), at page 131:

> "One who suddenly finds himself in a position of imminent peril, without sufficient time to consider and weigh all the circumstances or best means that may be adopted to avoid an impending danger is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless the emergency in which he finds himself is brought about by his own negligence."

Similar pronouncements of this rule are found in *Chapman v. United States, supra; Dane v. Canal Insurance Company*, 240 La. 1038, 126 So.2d 355 (1961).

Merchants Motor Freight v. Downing, 227 F.2d 247 (8th Cir. 1955), provides an example of reversible error based on failure to instruct on sudden emergency or legal excuse:

> "The defendant contends that since the jury found for the defendant they did not believe Mangert [plaintiff's driver]. This reasoning is not sound. The jury was not instructed on legal excuse and care required in an emergency. They may have found for the defendant under the instructions merely because the evidence showed without controversy that plaintiff's vehicle was on the wrong side of the road after the jackknifing and just prior to the collision."
>
> . . . . . .
>
> "This court has held that a party is entitled to a special instruction on his theory of the case if there is evidence

> to support it, and if a proper request has been made. * * * The court committed prejudicial error in failing to submit the legal excuse issue to the jury."

Merchants Motor Freight v. Downing, supra, at pp. 253-4.

In many instances this Court has held that failure to instruct the jury adequately on a concept of law vital to a litigant's case is tantamount to reversible error. *Pryor v. Williams*, 254 U.S. 43 (1920); *Texas & P.R. Co. v. Bourman*, 212 U.S. 536 (1909); *City of San Juan v. St. John's Gas Co.*, 195 U.S. 510; see also, *Daigle v. Louisiana Power & Light Co.*, 247 F.2d 227 (5th Cir. 1957).

Because the evidence warranted a charge on the question of sudden emergency, it is urged that the suggestion by the Court of Appeals that it be considered by the district court at the time of the new trial was well-founded.

II. THE COURT OF APPEALS CORRECTLY REVERSED THE JURY'S FINDING THAT CLECO's NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF THE ACCIDENT SINCE SUCH FINDING WAS UNSUPPORTED BY THE EVIDENCE, AND RESULTED FROM ERRONEOUS, MISLEADING INSTRUCTIONS.

A. The Finding Was Unsupported by the Evidence.

The legal presumption of due care on the part of Newton, discussed above, has not been rebutted by defendants, and plaintiff submits that the accident was proximately caused when the pilot, exercising due care, crashed into the wires because they were impossible to see due to CLECO's failure to mark and light the towers and wires in accordance with the minimum standards established by the CAA-FAA.

A proximate causal relationship exists in Louisiana when the negligent act—here CLECO's failure to mark and light its installation—is a substantial factor in bringing about the harm; another expression of the test used is to determine that the injury would not have occurred but for the negligence of the defendant. *D & D Planting Co. v. Employers Casualty Co.*, 240 La. 684, 124 So.2d 908 (1960); *Leonard v. Holmes & Barnes, Ltd.*, 232 La. 229, 94 So.2d 241 (1957); *Harvey v. Great American Indemnity Co.*, 110 So.2d 595 (La. App. 1959).

If defendant's negligent acts are in the nature of omissions to take necessary action, "the mere possibility that the accident would have occurred despite the required precautions does not break the chain of causatioon." *Dixie Drive It Yourself Sys. v. American Beverage Co.*, 242 La. 471, 137 So. (2d) 298, 304 (1962), and authorities therein cited.

CLECO's negligence in filling out Form ACA-117 kept the CAA-FAA from learning the true facts of the proximity of these towers to Slaton Seaplane Base and Brown and Root Airfield, thus preventing the CAA-FAA from investigating and requiring painting and illumination of CLECO's towers and wires. This withholding of information from the CAA-FAA came about through CLECO's employee, Bonnette, delegating the responsibility of filing the form to Woodruff, who had never been to the site and had no knowledge of the presence of seaplane bases and air traffic on the Intracoastal Waterway. Bonnette was acquainted with this fact from personal observation, as was Berry, another CLECO employee, but none of CLECO's employees relayed this information to Woodruff, who was given the task mainly because his office and that of the CAA-FAA were located in the same city of Fort Worth.

Earl Stone of the FAA stated that had he been informed the towers and wires were in close proximity to a seaplane base not listed on the Airman's Guide or current aeronautical charts, he would have written the operator of such unlisted airport, advising him of the proposed construction, to ascertain if the operator had any recommendations. Clearly, Mr. Stone's correspondence with Slaton would have resulted in Slaton's request for extra marking of the installation. Slaton had already attempted to accomplish this very thing by writing to CLECO directly on March 12, 1956. (Tr. p. 488.) However, CLECO's negligence in not revealing its location with regard to Slaton's base, pretermitted the taking of such steps by the FAA, and was a proximate cause of the accident since otherwise the FAA would have required the towers and wires to be lighted and marked.

In addition, the negligence of Bill Howe, to whom Woodruff had delegated the job of filling out Form ACA-117 is chargeable to CLECO, his principal. Howe either did not discover the Brown and Root's Airfield, listed in the aeronautical charts and Airman's Guide, or simply negligently failed to list it as the "nearest landing area." Because Brown and Root is located 15,000 feet from CLECO's towers and wires, the FAA would classify CLECO's installation an obstruction to air navigation and would recommend that it be painted and lighted in accordance with FAA standards. Once again, failure to divulge this information respecting Brown and Root's Airfield prevented the FAA from stepping in and making recommendations and ultimately precluded CLECO's lighting and painting the towers and wires so that this accident could have been avoided, making such negligence a proximate cause of the accident.

B. Instructions Relating to Proximate Cause Were Erroneous and Misleading.

It is apparent that the jury was hopelessly misled by the erroneous charges given by the trial judge, and consequently, was under the misapprehension that CLECO's negligence could not be the proximate cause. Uncontestable proof of the jurors' bewilderment is furnished by their subsequent return to the courtroom for further instructions on the proximate cause (Tr. 748-9). Their confusion is understandable when it is recalled that they were instructed regarding a nonexistent intervening negligent act (Tr. p. 730), and they also received this instruction:

> "Even if you should find that CLECO was negligent, if you also find that its negligence had become **passive or static** and that the negligence of another brought about the conditions which caused the accident, the you (sic) verdict should be for CLECO, or that it was not negligense or not the proximate cause." (Emphasis supplied.) (Tr. p. 731.)

Referring to the instructions quoted above, the Court of Appeals held that reversible error had been committed when the jury was so charged:

> "Together with the response given to the questions so propounded by the jury, they serve to distort and draw out of focus the duty which the law placed upon CLECO. The emphasis upon negligence as **an act** and upon the requirement that it 'directly' and 'proximately' caused or contributed to the accident, coupled with the instruction that CLECO would be absolved of liability if its negligence had become passive or static; and if the negligence of another brought about the condition which caused the accident, was calculated to acquit CLECO of its proven

and jury accepted negligence in maintaining the wires at a point where it knew planes customarily passed over and under them without taking precautions adequate to the surrounding circumstances. The charge as a whole seems to leave the definite impression that the passive and static presence of the wires was not to be considered as negligence if Newton chose to approach the landing under and in close proximity to them, as was the custom." (Emphasis in the original)

Moses v. Central Louisiana Electric Company, supra, at p. 72.

In this connection, the Court of Appeals cited and relied upon *Dixie Drive It Yourself Sys. v. American Beverage Co., supra*, which petitioners have argued was error because *Dixie* was decided after the trial of the instant case; hence, the appellate court wrongfully ". . . reversed the trial court on the basis of a change in the law occurring in the interim." (Petition, p. 6). A reading of this decision discloses that the Louisiana Supreme Court relied on prior jurisprudence, and did not announce any change in the law. (See *Dixie Drive It Yourself Sys. v. American Beverage Co.*, 137 So.2d at p. 306, footnote 17.) The court did take the opportunity to comment upon ambiguous language in certain decisions, and to conclude that "Insofar as such a conflict exists, we have elected not to follow these decisions." *Dixie Drive It Yourself Sys. v. American Beverage Sys.*, 137 So.2d at p. 307. Since petitioners have failed to indicate what modification of Louisiana law was effected in the *Dixie* case, and the plain language of that opinion refutes such a contention, respondents urge that the argument is without merit.

Further, as petitioners admit, reliance upon a decision rendered subsequent to the judgment in the case at bar, has

been approved by this Court in *Huddleston v. Dwyer*, 322 U.S. 232 (1944). (Petition, p. 6) Some attempt is made to escape this precedent by citation of *England v. Louisiana Board of Medical Examiners*, 84 S. Ct. 461 (1964), which petitioners aver ". . . has cast strong doubt on this practice." (Petition, p. 6.) Petitioners give no enlightenment as to the manner in which these doubts proceed from the *England* decision, and it is submitted that in fact, such is not the case.

As a consequence of the erroneous statement of law contained in the instructions, it was inevitable that the jury was misled and returned a verdict contrary to the evidence adduced. This view expressed by the Court of Appeals was eminently correct, and in harmony with holdings of this Court, *United States v. River Rouge Improvements Co.*, 269 U.S. 411, 421 (1926); *Chicago, Rock Island and Pacific R.R. Co. v. Houston*, 95 U.S. (5 Otto) 697 (1878); see also, *Thacker v. J. C. Penny Co.*, 254 F.2d 672 (5th Cir. 1958); *Daigle v. Louisiana Power & Light Co.*, 247 F.2d 227 (5th Cir. 1957).

C. Additional Instructions Given to the Jury Were Erroneous and Misleading.

One hour and forty minutes after retiring for deliberations, the jury returned to request these additional instructions: "Re-read charge quoting negligence by more than one party; Define 'a proximate cause of the accident.'" (Tr. p. 748.) In answer to the second query, the Court gave this charge:

> "I charge you further that in the eyes of the law negligence is actionable only when it is the proximate cause of the injury received. That is to say, **where the negligence proceeds in an unbroken chain without independent**

intervening cause up to the point of causing the accident or precipitating the accident.

"Now, that is about as good a definition of proximate cause as you can get. It is a legally, foolproof definition of proximate cause. Unfortunately, it is not the type of definition that is too helpful to a Jury who is trying to determine with reference to proximate cause **if there is a duty** on the part of a person to do a certain act, and that party fails to perform that duty will result in an accident, then that failure can be said to be the proximate cause of the accident. Now, that is another way of stating proximate cause." (Emphasis supplied.) (Tr. pp. 748-749.)

With respect to the district court's statement that the negligence must proceed in an unbroken chain, respondents submit that such a statement of law conflicts with the principle enunciated in *Jackson v. Jones*, 224 La. 403, 69 So.2d 729 (1954), to the effect that if a person creating a danger could or should reasonably have foreseen that the accident might occur, he is liable notwithstanding the intervening cause. See also *Fisher v. Norwich Union Fire Insurance Society, Ltd.*, 119 So.2d 562 (La. App. 1960); *Chavers v. Blossman*, 45 So.2d 398 (La. App. 1950); *Kiriluk v. Kohn*, 16 Ill. App. 2d 385, 148 N.E.2d 607 (1958); Note, 9 Kansas L. Rev. 539 (1959); Note, Tul. L. Rev. 419 (1931).

Particularly relevant to this issue is *Leposki v. Railway Express Agency*, 297 F.2d 849 (3rd Cir. 1962), in which an erroneous instruction relative to an intervening act led to reversal of the judgment. In that case, defendant claimed that the intervening act of two boys setting fire to gasoline dripping from defendant's gasoline tank intake pipe barred plaintiffs' recovery for fire damage resulting when the flames spread to plaintiffs' house. The court disagreed, noting that

jury could find that the ". . . intervening act was merely a reaction to a dangerous situation that defendant itself created." *Leposki v. Railway Express Agency, supra,* at p. 851.

Over and above this error in regard to the applicable law, the district court also was mistaken in charging the jury that failure to perform a duty ". . . was another way of stating proximate cause." Unquestionably failure to perform a duty constitutes negligence, but does not denote proximate cause. *Dixie Drive It Yourself System v. American Beverage Co., supra.*

When the jury is given no assistance in its endeavor to return a verdict in conformity with the controlling jurisprudence, but instead is misled and confused by the trial judge's charges, reversible error is present, *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430 (1949); *DeLima v. Trinidad Corporation*, 302 F.2d 585 (2d Cir. 1962); *Atkinson v. Roth*, 297 F.2d 570 (3rd Cir. 1961). Accordingly, the judgment of the Court of Appeals herein should not be disturbed.

III. THE COURT OF APPEALS CORRECTLY SET ASIDE THE JURY VERDICT DENYING RECOVERY FOR THE DEATH OF ROBERT MOSES.

As pointed out in the foregoing, respondents contend that Newton's contributory negligence should not have been mentioned to the jury due to the lack of evidence to substantiate this instruction. However, because this issue was submitted to the jury, the trial judge should have given instructions requested by respondents (No. 20, Tr. p. 125), stating that any contributory negligence of Newton could not be imputed to Moses, *Jack v. Travelers Insurance Co.*, 112 So.2d 308 (La.

App. 1959). The Court of Appeals finding on this point was the following:

> "We suggest that, on another trial, the district court take particular note of whether any contributory negligence on the part of decedent Moses was shown. We think that proof on this point is meager indeed, and that it is very doubtful from the record before us whether Moses was chargeable with the contributory negligence of Newton, if such could be proven."
>
> *Moses v. Central Louisiana Electric Company, supra*, at p. 73.

Respondents urge that the Court of Appeals' holding was justified by the evidence, and that failure to convey Mrs. Moses' theory of recovery was error, *Atkinson v. Roth, supra; Baxter v. Ainsworth*, 288 F.2d 557 (5th Cir. 1961); especially in view of the presumption that Moses exercises due care up to the moment of his death, *Simon v. Texas & P. Ry Co., supra*, and the hesitance of the courts to apply assumption of risk in airplane cases, *Boise v. Payette Lumber Co. v. Larsen*, 214 F.2d 373 (9th Cir. 1954); *Montellier v. United States*, 202 F.Supp. 397 (E.D. N.Y. 1962); *Bruce v. O'Neal Flying Service*, 231 N.C. 181, 56 S.E.2d 560 (1949).

CONCLUSION

Petitioners have argued that the reversal of the jury's verdict violates the Seventh Amendment, and thereby deprives them of their trial by jury. As respondents have pointed out, the instructions were not only erroneous statements of the laws pertaining to the issues, but were also so misleading as to prevent the jury from arriving at a fair evaluation of the evidence presented. Certainly the Constitutional guarantee of a jury trial can not be interpreted to mean that a jury ver-

dict, based on such instructions, must be binding on the appellate court. Such a proposition would deny to the Courts of Appeals their function of reviewing decisions and reversing judgments for errors of law, and would allow honest mistakes by misinformed jurors to work injustices on litigants. *Sunkist Growers v. Winckler & Smith Citrus Pr. Co.*, 370 U.S. 19 (1962); *Burdell v. Denig*, 92 U.S. (2 Otto) 716 (1876).

The decision of the Court of Appeals herein, being fully supported by the jurisprudence of this Court, is correct, and should not be reviewed. It is respectfully submitted that the petition for certiorari should not be denied.

Respectfully submitted,

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CERTIFICATE

I hereby certify that copies of the foregoing Brief in Opposition to Petition for Certiorari have been served on Alvin R. Christovich, Sr., 1815 American Bank Building, New Orleans, Louisiana; John B. Baus, 225 Baronne Street, New Orleans, Louisiana; David W. Robinson, 137 St. Ferdinand Street, Baton Rouge, Louisiana; W. Ford Reese, Richard C. Baldwin, and Thomas J. Wyllie, of the firm of Adams and Reese, 847 National Bank of Commerce Building, New Orleans, Louisiana; Jacob Landry, and Jack Cousin, of the firm of Landry, Watkins, Cousin & Bonin, 211 East Main Street, New Iberia, Louisiana by placing same in the United States Mail, postage prepaid.

Baton Rouge, Louisiana, this _____ day of _____, 1964.

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